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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 740

JOHN BLAAUW, A MINOR, BY GERHARD BLAAUW, HIS FATHER AND NEXT FRIEND, AND GERHARD BLAAUW,
Petitioners,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, A CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

John Blaauw, a minor, by Gerhard Blaauw, his father and next friend; and Gerhard Blaauw, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit rendered on the 17th day of June, 1964. Petition for a rehearing was denied on August 13, 1964.

OPINION BELOW.

The opinion of the Court of Appeals is included herein (Appendix pp. 21-27) and also reported in 333 F. 2d 540.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. 1332 and 28 U. S. C. 1254. Petitioners' application for rehearing in the Court below was timely filed and was denied on August 13, 1964. By order of Associate Justice Tom C. Clark the time for filing of a petition for writ of certiorari was extended to December 19, 1964.

PRELIMINARY NOTE.

At the outset the Court's attention is respectfully called to the following:

1. On the 30th day of September, 1963, the petitioners filed in the Court of Appeals a motion to stay the proceedings in this cause for the reason that the Illinois Appellate Court had under consideration identical questions presented in this case; that new questions of Illinois law were involved, and that the Illinois law should soon be settled on the critical questions presented here. This motion was denied. However, after oral argument, and on April 3, 1964, the Court of Appeals of its *own motion*, stayed the proceedings, stating that: "a case is under consideration in the Illinois Appellate Court that involved the same issue and should settle the Illinois law on the issues."

However, on June 17, 1964, the Court set aside its order staying the proceedings and handed down its opinion. On October 16, 1964 the Illinois Appellate Court handed down its decision in *Edwards*. It is the petitioners' contention

that the Illinois decision is diametrically opposed to the decision of the Court of Appeals.[1]

QUESTIONS PRESENTED.

1. Is the order of an administrative body which goes beyond the investigation conducted, the findings of fact made, and which is claimed to deal with a subject not even mentioned in the proceedings, a valid order on that subject?

2. Can a person who is not a party to the administrative proceedings, nor privy to a party, be foreclosed from claiming that a certain construction of an admisistrative order would render it void upon the grounds that his contention constitutes a "collateral attack"?

3. Specifically where a general order of a state commission, to whom the legislature has delegated power over public utilities, has been entered, keeping prior safety ordinances in force and effect, can a railroad fencing ordinance be rescinded by a later order when there has been no investigation into railroad fencing, no finding of fact on that subject and where railroad fencing is not even mentioned in the alleged rescinding order?

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1. The petitioners have included in the Appendix filed as a portion of this Petition the Opinion of the Illinois Appellate Court in the *Edwards* case (Appendix pp. 28-54) and have also included in the Appendix a copy of General Order No. 121 of the Illinois Commerce Commission, and the Preamble of General Order No. 138 (Appendix pp. 56-61). The latter order is 39 pages long, including explanatory diagrams. Because of the length of the latter order the whole order was not included in the Appendix. It is, however, filed of Record as Exhibit No. 34.

STATEMENT OF THE CASE.

The Facts.

On the 29th day of June, 1956, John Blaauw, then five, was seriously injured on the right-of-way of the defendant, Grand Trunk Western Railroad within the City limits of the City of Chicago. His left leg was run over and later amputated.

At the place in question the tracks of the defendant ran north and south, parallel and immediately adjacent to Central Park Avenue. Only a shallow culvert separated the street from the railroad tracks, which was about four or five feet above the street level. On the other side of the right-of-way (consisting of two tracks) an industrial concern had erected a cyclone fence. The railroad right-of-way on the east side, toward the street, was entirely unfenced.

The plaintiffs lived in a subdivision that started just east of the tracks. There was a controversy as to just how much of the subdivision had been finished at the time of the occurrence.

Just west of the tracks on the property of the railroad there existed a pond or slough, which drained out, when it did drain, through the culvert under the tracks. This culvert consisted of railroad ties placed in the "form of steps."

The plaintiffs' evidence (and some evidence for the defense) was to the effect that for a period of years children of the neighborhood had used the pond as a place to play. It contained a home-made raft. There were frogs, turtles, polliwogs, logs, etc. in the pond. In the summer the children would wade in the pond, play on the raft and fish for turtles. In winter they skated there. On the east side toward the subdivision there was no fence—or signs—or

anything to prevent trespassing. The pond was immediately to the west of the tracks. Passenger trains passed by at 60 mph—freight trains up to 40 mph. The latter frequently stopped in the area, since there was a crossing of another railroad some distance to the north.

On the day in question the plaintiff John Blaauw and two other children, one four and the other five, went to the railroad to "get a turtle" at the pond. When they arrived a long freight was standing on the east or northbound track. The minor plaintiff could not see the engine. While the others stood in the street next to the tracks, the minor plaintiff crawled under the train to the west side. When he got there "the slack went out" of the train, and it started northward. The child panicked. Although two adults (in the adjacent industrial property) tried to holler at him to stay where he was, he tried to grab onto the side of the train to get off the right-of-way. Running along the side of the train, trying to get on, he fell under and was run over. He tried to get up but fell backward onto the south bound track. The two adults scratched their way under the fence, ran to the child and carried him off the right-of-way just in time to avoid being run over by another train of the defendant, which was coming along in the opposite direction.

It was agreed at the trial that his leg had been cut off below the knee. However, since over the objection the Court had severed the issues of liability and damages no evidence of damages was permitted.

THE PLEADINGS.

The complaint consisted of two counts. The first charged common law negligence in maintaining the pond on the right-of-way attractive to children, a failure to fence, and failure of the crew to keep a lookout for children. Count II

was based on certain speed or fencing ordinances of the City of Chicago of 1890, 1905, 1911 and 1922. It also alleged the acceptance of the ordinances by the defendant's predecessor railroad, the issuance of the permit to the railroad to operate under the ordinance, partial fencing of the railroad within the City and a failure to fence in the area in question. The Count also alleged a violation of General Order No. 121 of the Illinois Commerce Commission alleged to have the effect of keeping the requirements of the fencing ordinance in force and effect.

The Defendants filed no motion to strike either count and filed no affirmative defenses. It merely denied the allegations of the complaint.

THE TRIAL.

Over the plaintiffs' objection the Court "split the issues" and decided to try the liability issue first. The Court at the end of the plaintiffs' case excluded all evidence relating to Count II and directed a verdict on that count. The jury returned a verdict of not guilty on Count I and the plaintiffs appealed. Besides sundry errors relating to Count I the plaintiffs claimed error in the Court's action as to Count II.

REASONS FOR GRANTING THE WRIT.

I.

The Court of Appeals Below Has Rendered a Decision in Direct Conflict With a Decision Recently Rendered by the Illinois Appellate Court on a Novel Question of Controlling Illinois Law.

Following their Notice of Appeal the plaintiffs moved the Court of Appeals to stay all proceedings herein until the Illinois Appellate Court had decided the issues in *Edwards, etc.* v. *The Pennsylvania Railroad, et al.*, alleging that the identical issues were therein involved. (In the *Edwards* case the lower Court had admitted the fencing ordinance, admitted General Order No. 121, and the two had been made the basis of an instruction to the jury.* A verdict of $275,000 had resulted.) At first the Court of Appeals denied the plaintiffs' motion. Later, after oral argument, the Court of Appeals *of its own motion* entered an order staying the proceedings. In so doing the Court said:

> "It appearing to the court that there is presently pending in the Appellate Court of Illinois, First District the case of *Edwards* v. *Pennsylvania Railroad Company*, No. 42221, involving a question of construction of Illinois law which is probably decisive in the above cause,
>
> IT IS THEREFORE ORDERED that the decision in this court in the above cause be and is hereby reserved until the further order of this court."

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* For the convenience of the Court both opinions have been printed in the Appendix to this petition pp. 21-55. General Order No. 121 and General Order No. 138 have also been made a part of the record, as Plfs' Exhibits No. 33 and 34. The complete record of notices, hearings of the Commission and the investigation leading up to General Order 138 also are included as Plfs' Exhibits 35, 36 and 37.

Despite this order the Court then reversed itself, rescinded its prior order, and handed down its decision affirming the Trial Court. This was followed by the Appellate Court's decision in *Edwards*, affirming the Illinois Trial Court. It is the plaintiffs' contention that the two decisions are irreconcilable.

Evidently the defendant in *Edwards* (The Pennsylvania Railroad Co.) is of the same opinion. In a Petition for Certificate of Importance filed in the Supreme Court of Illinois on November 12, 1964, its counsel say:

> "Also of great significance is the conflict with a recent opinion of the United States Court of Appeals (*Blaauw* v. *Grand Trunk Western Railroad Company*) which holds *directly* to the contrary, that is, the *Blaauw* case holds that railroads are not obligated to fence their tracks in the City of Chicago and the ordinances purportedly requiring them to do so are void."

Both plaintiffs relied on the fencing ordinances. In *Edwards* they were admitted—in *Blaauw*, refused. Both plaintiffs relied on General Order No. 121 of the Illinois Commerce Commission. In *Edwards* the order was admitted, in *Blaauw*, refused. Both made identical contentions with respect to General Order No. 138, namely, that the order must be restricted to the facts investigated, and the findings of fact made as a basis for the order. Both claimed that since there had been no investigation into fencing and no findings of fact made on that subject, the order could not be construed to effect a rescission of the fencing requirements and ordinances. Both claimed that if so construed the order would be void.

In *Blaauw*, as in *Edwards*, the plaintiffs contended that General Order No. 138 must be construed to effectuate its purpose (the revision of rules and regulations pertaining to railroad crossings with highways) and that the order must

receive that interpretation which will render it consistent with that purpose, rather than a construction which would render it invalid. We cited *Aloe* v. *Lowe*, 298 Ill. 404, at 408; *Midland Coal Corp.* v. *County of Knox*, 1 Ill. 2d 200, at 224, and *The People* v. *LaMothe*, 331 Ill. 351, at 357. This was the same contention supported by the same cases as was made in *Edwards*.

The Court of Appeals in *Blaauw* misconstruing entirely the plaintiffs' position, characterized the plaintiffs' attack on General Order 138 as one relying on "procedural errors," said it was a "collateral attack." It held that such procedural errors do not render the order void, but voidable only, and "not subject to collateral attack."

In the *Edwards* case, the Illinois Appellate Court, without benefit of the briefs in *Blaauw*, in deference to the Court of Appeals, accepted the entirely erroneous concept of the Court in *Blaauw*, and attempted to distinguish the two cases. But we submit that they cannot, and ought not be so distinguished.

As a matter of Illinois law it has now been held:

(a) That the requirements of the Chicago fencing ordinances were binding in 1959. Our case happened in 1956.

(b) That although the Public Utilities Act had transferred power over railroads to the Commission in 1914 and 1921, General Order No. 121 had the effect of keeping those fencing requirements in force and effect.

(c) That the lower Court had properly given the ordinance count to the jury and they had properly been instructed on that count.

All the foregoing have been denied in *Blaauw*.

II.

If Permitted to Stand the Decision Would Do Away With the Requirements of a Hearing and Findings of Fact, as a Basis for Administrative Orders, and Violate the Provisions of the Due Process Clause of the 14th Amendment to the Federal Constitution.

Reference to the *Edwards* opinion (Appendix pp. 28-55) shows that in 1934 the Illinois Commerce Commission, pursuant to the applicable sections of the Public Utilities Act of Illinois,* started an investigation into the subject of *"Proposed Revision and Consolidation of Rules and Regulations and Requirements * * * Relating to the Construction, Maintenance, Marking and Protection of Crossings of Highways and Railroads in the State of Illinois."* Hearings on those subjects, *alone* were held, and findings on those subjects *alone*, were made.*

In 1937 General Order No. 138 was issued. It is a 39-page order including explanatory diagrams. As stated in *Edwards*, "Nowhere in the entire document is there a word pertaining to the subject-matter of fencing."

No hearings were had on that subject. No evidence was taken on that subject. No findings of fact were made on that subject.

Accordingly, the Court in *Edwards* properly held that the order in question could not and did not nullify the rail-

* The Illinois Public Utilities Act (originally § 67, now § 71 Ill. Rev. Stat. 1963, chap. 111-2/3, § 71, requires that the Illinois Commerce Commission give notice of the subject matter to all interested parties, and afford them an opportunity to be heard before it can alter or rescind any prior order. Furthermore, the Commission's authority to act under § 67 is controlled by § 65 of the Act (presently § 69) in that such rescinding or modifying order must be based on findings of fact which in turn must be based upon the evidence presented. (*Edwards* v. *Pennsylvania Railroad Co.*, Ill. Appellate Ct. No. 49221, and cases cited therein.)

road's obligation to fence. If so construed, the order would be void.

The Appellate Court's ruling is not only consistent with the Illinois decisions (See: *Farmers Elevator of Yorkville, et al.* v. *Chicago R. I. & P. Ry. Co.*, 266 Ill. 567, *Central Northwest Business Men's Association* v. *Commerce Commission*, 337 Ill. 149, *Chicago District Pipeline Co.* v. *Commerce Commission*, 361 Ill. 296, *Dietman* v. *Hunter, et al.*, 5 Ill. 2d 486), but is also consistent with a long line of decisions of the United States Supreme Court.

In *Interstate Commerce Commission* v. *Louisville & N. Ry. Co.*, 227 U. S. 88, at 91-92, 57 L. Ed. 431, at 433, the Court discussed the power of the Interstate Commerce Commission. The carrier there contended that the order of the Commission was void because there was no material evidence to support it, and the Government there contended that the order was conclusive even if the finding was without substantial support in the evidence. The Court below stated:

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat."

In the same case the Court stated:

> "A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law, and must, in the language of the statute, be 'set aside by a court of competent jurisdiction.'"

To the same effect is:

Wichita Railroad & Light Co. v. *Public Utilities Commission*, 260 U. S. 48, at 58;

Morgan v. *United States*, 292 U. S. 468; 80 L. Ed. 1288;

Londoner v. *Denver*, 210 U. S. 372, 386, 28 S. Ct. 709;

Morgan v. *United States*, 304 U. S. 1, at 14, 82 L. Ed. 1129.

The identical rule applies in Illinois with respect to orders purporting to rescind a prior order.

See:

Businessmen's Association v. *Commerce Commission*, 337 Ill. 149, at 158, and *Chicago Railways Co.* v. *Commerce Commission*, 336 Ill. 51.

Since There Was No Evidence Taken on the Subject of Railroad Fencing and No Findings of Fact on That Subject a Construction of General Order No. 138 as a Rescission of the Railroads' Obligations to Fence Would Not Only be Void But Unconstitutional.

In the *Edwards* case the Illinois Appellate Court, carefully reviewing the administrative record leading up to General Order No. 138 concluded:

(a) That the cause was docketed as an investigation into the rules and regulations and orders relating to the construction, maintenance, marking and protection of the crossings of highways and railroads in Illinois.

(b) That all of the orders changed, modified or amended, except General Order No. 121, relate to that subject.

(c) That the inquiry was "precisely" limited to that subject.

(d) That railroad fencing was not involved.

(e) That in the entire order there is not one word on fencing.

In such instance construing the order as a rescission of the fencing requirements would make the order not only void, but also unconstitutional, for hearings and findings of fact are essential to due process.

In *Postal Telegraph Co.* v. *Newport*, 247 U. S. 464, 62 L. Ed. 1215, the Court said:

> "As an opportunity to be heard is, in judicial proceedings, a requisite to due process of law, courts cannot, without disregarding the requirements of due process, give conclusive effect to a prior judgment against one who is neither a party or in privity with a party to such lawsuit."

In *Morgan* v. *U. S.*, 304 U. S. 1, 14, this Court, speaking of administrative regulations, said:

> "The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall determine the standards of administrative action and that in administrative proceedings of a quasi judicial the liberty and property of the citizen shall be protected by the rudimentary requirement of fair play. These demand a fair and open hearing—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an inexorable safeguard."

To the same effect is *Morgan* v. *United States*, 298 U. S. 468, *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, at 91, 92, 57 L.Ed. 431, at 433, and *Wichita Railroad & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, at 58, in which the Federal law and the law of the State of Illinois is equated.

III.

In a Matter of Far-Reaching Importance the Court of Appeals Below So Radically Departed From the Accepted Course of Judicial Proceeding as to Call for an Exercise of This Court's Power of Supervision.

The City of Chicago is a sprawling metropolis of approximately four million people. It is criss-crossed by many railroads and thousands of miles of tracks. Chicago is literally the "Railroad Center of the World." Over a period roughly from 1890 to 1925 a series of fencing ordinances and track elevation ordinances (which included fencing ordinances by reference) were adopted and accepted by the respective railroads. The railroads accepting received benefits from the ordinances in the form of immunity from the enforcement of restrictive speed regulations, and requirements for gates, bells, etc., within the City limits. The entire program was a comprehensive detailed, thoughtful plan designed to benefit the railroads, the public, and the City.

When power over public utilities was transferred to the Public Utilities Commission (later the Illinois Commerce Commission) and when several decisions had affirmed that transfer of power the Illinois Commerce Commission passed General Order No. 121 to prevent "anarchy in the operations of utilities." *Blease* v. *Grand Trunk Western Railroad Company.*

The preamble of that order (Appendix pp. .....) reveals the vast extent of the dilemma facing the Commission. The vacuum created by the transfer of powers to the Commission would have left the public entirely without the protection of law. The solution was suggested by the Illinois Supreme Court in the *Northern Trust* case (*Northern Trust Co.* v. *Chicago Rys. Co.*, 318 Ill. 402). Following

that suggestion the Commission passed General Order No. 121, keeping in force and effect the practices and operations in compliance with the prior ordinances. They should be "established, continued, and maintained until the further order of the Commission."

But if the opinion of the Court of Appeals is correct, then since 1937 the people of the City of Chicago, including minors of tender age have been entirely stripped of the protection of the fencing ordinances and track elevation ordinances, and the protective program that took over 30 years to develop is destroyed in one sentence. The railroads can fence or not as they please.

By a decision that does not deign to analyze the proceedings leading up to General Order No. 138 (although the entire record was before it* and because of one sentence included in the order the entire program of railroad fencing for the protection of the public is destroyed. That is the contention of the defense, and that is the effect of the opinion of the Court of Appeals.

We submit the decision of the Court of Appeals is wrong and that it so far departs from the accepted course of judicial procedure as to call for an exercise of this Court's power of supervision.

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* The plaintiffs filed in the Court of Appeals as plaintiffs' Exhibits Nos. 35, 36 and 37, a certified copy of the entire record of the Illinois Commerce Commission pertaining to General Order No. 138.

IV.

The Court of Appeals Misconstrued the Plaintiffs' Contentions With Respect to General Order No. 138. The Court Was Wrong in Holding that the Plaintiffs' Position Was Based on "Procedural Errors Only," and That the Order Was Not Subject to "Collateral Attack."

In this case the plaintiffs filed a comprehensive printed Trial Court brief. Eight pages thereof were devoted to General Order No. 138. Therein the exact contentions were made which were later held valid in *Edwards*—namely, that since there had been no investigation on the subject of railroad fencing, and no findings of fact on that subject, the order could not be construed to effectuate a rescission of the railroad's fencing obligations, and that if so construed, the order would be *void*.

This contention was wrongly characterized by the Court of Appeals as based on "Procedural errors only." On the contrary, it was basic and fundamental.

The Court was also wrong in holding that the plaintiffs had not claimed in the Court of Appeals that General Order No. 138 was void if construed to rescind the fencing regulations. That was our contention in the Trial Court as well as in the Court of Appeals and we have never deviated from that position.

A Void Order May Be Collaterally Attacked at Any Time by Any Person.

It remains finally to be shown that an order, judgment or decree which is void, may be attacked at any time, or in any forum.

In *Bernard* v. *Michael*, 392 Ill. 130, at 135, the Court said:

> "A judgment order or decree entered by a court which lacks jurisdiction of the parties, or of the sub-

ject matter, *or which lacks the inherent power to make or enter the particular order involved, is void, and may be attacked at any time or in any court, either directly or collaterally*" (Emphasis supplied).

In *Reynolds* v. *Burns*, 20 Ill. 2d 179, at 132 (1961), the Court stated:

> "A void judgment can be impeached at any time in any proceedings whenever a right is asserted by reason of that judgment, and it is immaterial in consideration of the validity of the judgment, whether or not the time for review by appeal has expired."

The Court further said:

> "Although the plaintiffs vigorously insist that the defendants are not entitled to collaterally attack that proceeding, it clearly falls within the category of void judgments which can be impeached at any time."

In *Oeth* v. *Erwin*, 6 Ill. App. 2d 18, at 21, the Court said:

> "When the court is exercising a special statutory jurisdiction there is no presumption of jurisdiction, but the record must show on its face that the case is one where the Court has authority to act and if it does not, the judgment is void and subject to collateral attack when the court is one of limited or general jurisdiction. * * *"

In *Thayer* v. *Village of Downers Grove*, 369 Ill. 334, at 339, the Supreme Court of Illinois said:

> "Where the court entering the judgment has exceeded its jurisdiction and such judgment or decree transcends the statute conferring jurisdiction on the court, such judgment or decree is void and may be collaterally impeached or set aside on motion after the time for review by appeal has expired."

The Court further said:

> "It is a rule well established that a void judgment or order may be vacated at any time and the doc-

trine of laches and estoppel does not apply. Jurisdiction in a particular case *is not only the power of the court to hear and determine it, but also the power to render the particular judgment entered, and every act of the court beyond its jurisdiction is void*" (Emphasis supplied).

The doctrine is summarized in Freeman on Judgments, Fifth Edition, Volume 2, Sec. 642, pages 135-1 to 135-3:

> "A judgment is void collaterally when the court rendering it acted without jurisdiction. The judgment in such case amounts to nothing and, of course, has no force as res adjudicata. It is not material in what respect the jurisdiction was lacking, whether because the parties have not been brought within its control or because the subject matter of the action was one over which the court had no jurisdiction whatever, or *because in the exercise of its jurisdiction the court exceeded its powers by going entirely beyond the matter submitted to it*" (Emphasis supplied).

The cases relied upon by the Court of Appeals in *Blaauw*, did not involve void orders or orders a part of which were void, where there was no evidence on the point, or findings were not based upon the evidence, or orders not based upon the evidence and findings. These cases, therefore, are not in point. In each instance the parties attacking the order had been notified, had waived their right to participate in the proceedings.

For example, in *Peoples Gas Light & Coke Co.* v. *Buckles*, 24 Ill. 2d 520 at 528, the court said:

> "The defendants in this case were notified of the Commerce Commission proceedings, but did not take part therein nor contest the order of the Commission by direct appeal. They cannot now collaterally attack the order."

The same is true of *Illini Coach Co.* v. *Commerce Commission*, 408 Ill. 105, and *Colton* v. *Commonwealth Edison Co.*, 349 Ill. App. 490.

In *Illini Coach Co.* v. *Commerce Commission*, 408 Ill. 105, Illini participated in the hearings but filed no petition for a rehearing and took no appeal. Seven years later they attempted to collaterally attack the order. It was properly held they could not do so.

V.

There Exists No Valid Distinction Between the Theory of Liability, the Evidence Offered, and the Contentions Made by the Plaintiffs in Blaauw and Edwards. Any Asserted Difference Is Illusory and Unfounded in Fact.

A comparison of the pleadings in the two cases, a comparison of the evidence offered and received in the *Edwards* case with the evidence offered and rejected in Blaauw, will demonstrate that the theory of recovery in each instance was identical. A comparison of the briefs of both plaintiffs is invited. Both plaintiffs relied on the fencing ordinances of the City of Chicago. Both relied on General Order No. 121 as an order which had the effect of keeping the fencing ordinances and the practices and operations in accordance therewith, in force and effect. Each made the identical contention with respect to General Order No. 138. The briefs filed cited the same cases and made the same arguments. A comparison will demonstrate their equivalence.

As a matter of fact the theory of the plaintiffs in *Blaauw* and *Edwards*, including the allegations with respect to General Order No. 121 and the plaintiffs' argument and legal position relative to General Order No. 138 were first advanced by the writer of this Petition in *Kedzierski* v.

Illinois Central Railroad, Superior Court of Cook County No, 51S 14777, which was tried by counsel for the plaintiffs in Blaauw in 1956. After a verdict in the amount of $155,000.00 the case was settled. Both *Blaauw* and *Edwards* were patterned after that case.

In the case at bar recovery has been denied to a five-year old child resting his case on the same basic arguments as that of *Edwards*, a thirteen year old whose recovery has been sanctioned by the Illinois Appellate Court. We submit that any supposed distinctions between the two cases is one without a difference, illusory and unreal.

CONCLUSION.

For the reasons apparent on the record and suggested in the instant Petition we respectfully submit that this Court should grant Certiorari and reverse the judgments below.

Respectfully submitted,

RICHARD G. FINN and
WILLIAM P. BUTCHER,
Attorneys for Petitioners.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI.

DECISION OF COURT OF APPEALS.

IN THE UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

No. 14329 SEPTEMBER TERM, 1963 JANUARY SESSION, 1964

JOHN BLAAUW, a minor, by GERHARD BLAAUW, his father and next friend, and GERHARD BLAAUW,
Plaintiffs-Appellants,
v.
GRAND TRUNK WESTERN RAILROAD COMPANY, a corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 17, 1964

Before DUFFY, CASTLE and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* The questions presented are whether the district court erred in denying plaintiffs'[1] motion for a new trial on the ground that the verdict for defendant in plaintiffs' personal injury suit was contrary to the "manifest weight of evidence"; and whether the court erred in deciding as a matter of law that the defendant railroad had no duty under a Chicago ordinance to fence its right-of-way. We think the court did not err in either ruling.

1. Plaintiff, John Blaauw, a minor, sues for damages for personal injuries for loss of his left leg; his father, as next friend, sues to recover medical expenses.

At the place of the injury, in the vicinity of 77th Place and Central Park Avenue in Chicago, defendant's right-of-way consisted of two tracks, and ran in a north-south direction. At the western boundary of the right-of-way was a six-foot cyclone fence belonging to the adjacent property owner. East of this fence, on the right-of-way, was a low place holding a pool of water in which small animals and debris gathered. Opposite this low place, on the unfenced eastern boundary of the right-of-way, was a culvert made of railroad ties which was used by neighborhood children, as steps to the right-of-way, elevated about four or five feet above Central Park Avenue, on their way to the pool of water to which they were attracted.

On June 29, 1956, John Blaauw, then five years old, went up upon the right-of-way with two companions. He, alone, crawled under the couplers of two cars of a standing northbound train on the east track. After he crawled through, the train began to move. He took hold of a grab-bar on one of the cars, ran a while with the train, tripped and fell beneath the wheels. The train did not stop, the trainmen not knowing of the accident at that time.

Under Illinois law a case like this one before us, dealing with a personal injury to a child, is not "labeled" an "attractive nuisance" case, but is tried under "the customary rules of ordinary negligence cases." *Kahn* v. *James Burton Co.*, 5 Ill. 2d 614, 624, 126 N. E. 2d 836, 841 (1955).

Count I of this case was based on common law negligence. The jury was instructed on plaintiffs' theory of negligent maintenance of a condition "attractive to children," negligent failure to fence the right-of-way and to keep a proper lookout; and that this negligence was the proximate cause of the injury. It was told to find for plaintiffs if it found the alleged negligence and proximate cause but should find for defendant if "any of these propositions was not proved." It returned a verdict of "not guilty." We are

asked by plaintiffs to set this aside because it was against the "manifest weight of the evidence."

In this diversity action this court "administers the state system of law in all except details related to [our] own conduct of business." *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 555 (1949). We assume, but need not decide, the Illinois manifest weight rule applies.[2] Under this rule questions of negligence, proximate cause and damages are pre-eminently questions of fact for a jury's determination, but we may set aside the verdict and judgment and remand for a new trial if we are clearly satisfied the verdict and judgment are wholly unwarranted from the manifest weight of the evidence. *Kahn* v. *James Burton Co.*, 5 Ill. 2d 614, 623, 126 N. E. 2d 836, 841 (1955).

However, we cannot say the verdict is against the manifest weight of the evidence because we think the jury could reasonably have found that defendant's alleged negligence was not the proximate cause of the injury. The jury might well have disregarded the minor's reason why he took hold of the grab-bar and ran with the train—that "I got a little scared * * * and I wanted to get myself on so that I could get out on the other side"—as of no consequence in the light of his admitted attempt to "flip" the train.

Because of this conclusion, that regardless of what motivated the boy's presence on the right-of-way the jury could reasonably infer that the conduct of the railroad was not the proximate cause of the injury, it is unnecessary for us to pass on the contention made that the district court erred in refusing plaintiffs permission to show that after the occurrence the pool was filled in and to argue this point to the jury. That evidence would be merely corroborative of negligence and would have no bearing on the issue of

2. Cf. *Zuckerman* v. *Berg Mfg. & Sales Co.*, 279 F. 2d 904, 905-06 (7th Cir. 1960).

causal connection. And we see no basis for t[redacted]he district court abused its discretion in separating for trial[3] the issue of liability from the issue of damages.

The jury was instructed[3] that notwithstanding the boy's incapability of contributory negligence, that rule could not supply the necessary proof of defendant's negligence. Plaintiffs attack the instruction, not on the ground that it erroneously states the law, but because, they say, it is "clearly argumentative" and "confusing and misleading." In the context of all the instructions, we do not see reversible error in giving the instruction.

Count II was based on the City of Chicago "Speed Ordinance" of March 26, 1890, which required that every corporation "operating a * * * railroad, within * * * the City of Chicago, shall, within such time as may be prescribed by the mayor and commissioner of public works, construct * * * on each side of its tracks, and in such place with reference thereto as the mayor and commissioner of public works shall approve or direct, * * * substantial walls or fences of such material, design, proportion and height as shall be determined and approved * * *." This ordinance was re-enacted several times to 1922, under power granted by Par. 27, Sec. 1, Art. V, of the Cities and Villages Act of 1872[4] which conferred on Chicago the power to require fencing for the protection of persons. *Heiting* v. *Chicago, R. I. & P. Ry. Co.*, 252 Ill. 466, 470-71, 96 N. E. 842, 844 (1911).

3. "The Court instructs the jury that * * * even though at the time of the occurrence the plaintiff John Blaauw was of such tender years as to be incapable of contributory negligence, nevertheless, absence of any negligence on his part would not serve to supply proof of negligence on the part of the defendant."

4. The provisions of the Act of 1872 are identical with § 23-34 of the Revised Cities and Villages Act of 1941, Ill. Rev. Stat., ch. 24, § 23-34 (1959) which provides the city shall have power "to require railroad companies to keep flagmen at railroad crossings of streets and to provide protection against injury to persons and property in the use of their railroads."

In 1913, however, the Illinois General Assembly adopted the Public Utilities Commission Act (Laws 1913, p. 459), creating the Public Utilities Commission with broad general supervision over all public utilities in the state. The Act was re-enacted in substantially the same form in 1921 (Laws 1921, p. 702) with the Illinois Commerce Commission formed as successor to the Utilities Commission. *Ill. Rev. Stat.*, ch. 111⅔, § 1 et seq. These acts deprived Chicago of its power to pass new, or enforce existing, municipal police regulations over public utilities. *Village of Atwood* v. *Cincinnati, I. & W. RR. Co.*, 316 Ill. 425, 147 N. E. 449 (1925), *Northern Trust Co.* v. *Chicago Rys. Co.*, 318 Ill. 402, 149 N. E. 422 (1925). The establishment of the Commerce Commission, with a grant of exclusive regulatory power, precludes the existence of even a residuum of concurrent power in municipalities. *Hemphill* v. *Wabash R. Co.*, 209 F. 2d 768, 771 (7th Cir. 1954).

The decision in *Miller* v. *Chicago & NW. RR. Co.*,[5] 254 Ill. App. 615 (1929) (abstract), *rev'd on other grounds*, 347 Ill. 487, 180 N. E. 454 (1932), does not persuade us that Chicago's fencing ordinance was not abrogated by the Public Utilities Act. The grounds of the *Miller* decision were the re-enactments of Par. 27, Sec. 1, as restoring the city's power, and *Maskaliunas* v. *Chicago & W. I. RR. Co.*, 318 Ill. 142, 149 N. E. 23 (1925). The first ground is unsupportable, because the several amendments of Par. 27, Sec. 1, subsequent to the passage of the Public Utilities Act, were mere continuations of the original enactment and did not restore the power to Chicago. *City of Altamont* v. *Baltimore & O. R. Co.*, 348 Ill. 339, 180 N. E. 809 (1932), *Hemphill* v. *Wabash R. Co.*, 209 F. 2d 768 (7th Cir. 1954). And in *Maskaliunas* the question of the abrogation of the ordinance by the Public Utilities Act was not raised or

5. Illinois Appellate Court cases decided prior to 1935 were, by statute, not binding precedents. However, we have considered the *Miller* opinion in reaching our result.

passed upon. That decision, therefore, has no force vis-a-vis the Illinois Supreme Court decisions in *Village of Atwood* v. *Cincinnati, I. & W. RR. Co.*, 316 Ill. 425, 147 N. E. 449 (1925), and *Northern Trust Co.* v. *Chicago Rys. Co.*, 318 Ill. 402, 149 N. E. 422 (1925), and no effect on the subsequent decision in *City of Altamont* v. *Baltimore & O. R. Co.*, 348 Ill. 339, 180 N. E. 809 (1932). Nor has any reported opinion construed *Muskalunas* as the appellate court in *Miller* did.

We therefore see no way by which the Chicago ordinance of 1890 can be said to continue in effect by its own force.

The Illinois Commerce Commission in 1926 entered General Order 121, which, by its terms, continued the "operation and practices" of utilities under municipal police regulations. The Order was enacted in response to the decisions[6] in *Village of Atwood* v. *Cincinnati, I. & W. RR. Co.*, 316 Ill. 425, 147 N. E. 449 (1925), and *Northern Trust Co.* v. *Chicago Rys. Co.*, 318 Ill. 402, 149 N. E. 422 (1925), as an emergency order to prevent anarchy in the operation of utilities. In substance, the Order provided that pending and during the Commission's investigation of the "operation and practices" of utilities the public would be without protection of law; that practices and operations of utilities under municipal police regulations "heretofore having the authority of law" should be "established, continued and maintained as the practices and operations" of the utilities until the Commission's further order. The "further order" came in 1937, when the Commission expressly found and ordered that "General Order 121, to the extent that it ap-

6. *Village of Atwood* v. *Cincinnati I. & W. R. R. Co.*, 316 Ill. 425, 147 N. E. 449 (1925), held that the Utilities Act repealed by implication the power of municipalities to require maintenance of flagmen at railroad crossings; and *Northern Trust Co.* v. *Chicago Rys. Co.*, 318 Ill. 402, 149 N. E. 422 (1925), held that the Utilities Act repealed by implication the power of municipalities to require streetcars to equip their cars with brightly lighted headlights.

plies to railroads, is superseded and rescinded by General Order 138."

Plaintiffs' attack on the validity of General Order 138 on grounds of alleged procedural errors is unavailing. Under Illinois law where a Commerce Commission order is within the statutory authority of the Commission and the Commission had jurisdiction over the parties and the subject matter of the order, procedural errors do not void the order but make it voidable only, and not subject to collateral attack. *Peoples Gas Light & Coke Co.* v. *Buckles*, 24 Ill. 2d 520, 528, 182 N. E. 2d 169, 174 (1962), *cert. denied*, 371 U. S. 185. *Illini Coach Co.* v. *Illinois Commerce Commission*, 408 Ill. 104, 110, 96 N. E. 2d 518, 522 (1951). *Colton* v. *Commonwealth Edison Co.*, 349 Ill. App. 490, 498-99, 111 N. E. 2d 363, 366-67 (1953).

No claim has been made to us that the Commission exceeded its statutory power when it ordered that General Order 121, so far as it pertained to railroads, was superseded by General Order 138, or that the Commission did not have jurisdiction over the parties or the subject matter of the order. We must therefore conclude that General Order 121, so far as it is pertinent here, was no longer in effect, at the time of John Blaauw's injury.

We conclude the district court below did not err in directing a verdict for defendant on Count II because defendant's obligation under the 1890 ordinance was cancelled by General Order 138.

It follows that the district court did not err in overruling plaintiffs' objection to defendant's counsel's argument that defendant was not required to build a fence so far as it is pertinent to plaintiffs, under statute or ordinance, at the time of this occurrence.

We have considered, but need not discuss, the other points raised.

The judgment is AFFIRMED.

49221.

American National Bank and Trust Company, a corporation, Guardian of the Estate of Henry Lee Edwards, a minor,
Plaintiff-Appellee,

v.

The Pennsylvania Railroad Company, a corporation; The Philadelphia, Baltimore and Washington Railroad Company, a corporation,
Defendants-Appellants.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation,
Defendant.

Appeal from Circuit Court Cook County.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

This is an action to recover damages for personal injuries suffered by a thirteen year old boy when he was run over by a Chicago, Milwaukee, St. Paul and Pacific Railroad Company train and suffered a traumatic amputation of both his legs. Suit was brought against three railroads: The Chicago, Milwaukee, St. Paul & Pacific Railroad Company, hereinafter referred to as the Milwaukee Railroad, the Pennsylvania Railroad Company and the Philadelphia, Baltimore & Washington Railroad Company, hereinafter jointly referred to as the Pennsylvania Railroads. Henry Lee Edwards, the minor on whose behalf this suit was instituted shall be referred to as the plaintiff.

The amended complaint contained two counts. Count I charged the Pennsylvania Railroads with failure to comply with the fencing requirements of a City of Chicago special

ordinance passed on January 18, 1897, and the Milwaukee Railroad with proximately contributing to plaintiff's injuries through the negligent operation of its train. Count II charged the Pennsylvania Railroads with common law negligence in failing to take reasonable precautions where serious harm to children was foreseeable, and the Milwaukee Railroad again with proximately contributing to plaintiff's injuries through the negligent operation of its train.

The jury returned a general verdict for the plaintiff against all three defendants for $275,000 and the court entered judgment on the verdict. Post-trial motions on behalf of all the defendants were denied. The Milwaukee Railroad has paid the plaintiff the sum of $75,000 for a covenant not to enforce the judgment against it. The Pennsylvania Railroads bring this appeal.

The accident occurred on June 12, 1959, on an elevated railroad embankment at Rockwell and Van Buren Streets in the City of Chicago. There were five railroad tracks on the embankment where the accident occurred, which ran in a north-south direction. The two easterly tracks were owned and controlled by the appellants and they operated their trains on those tracks. On a user basis, charging so much per car, appellants also leased these tracks to a number of other railroads, including the Milwaukee Railroad. The accident occurred on Pennsylvania track two, the second track from the east. The third and fourth tracks from the east were owned by the Chicago and NorthWestern Railroad, and it and other railroads used those tracks. The fifth or most westerly track was little used and is not involved here. Each track passes between large girders as it crosses over each underpass; these girders are six or seven feet high and about a foot and a half wide. The distance between the running board of a tank car and the top of one of the girders is only four to six inches.

Van Buren and Rockwell Streets, where the tracks in question are located, are in a heavily populated area of the City of Chicago; this has been the condition for many years. Within a few years prior to the accident in 1959, a housing project containing eight to ten story buildings has been constructed immediately east of the railroad tracks between Van Buren Street on the south and Jackson Boulevard on the north; there were a number of large apartment buildings in that area between the railroad tracks on the west and Western Avenue on the east. For many years a much used public playground was located immediately west of the railroad elevation, on the south side of Congress Street. Congress Street is a short block south of Van Buren Street. This large playground, known as Altgeld Park, contained several ball fields, swings and other playground equipment, and was extremely popular in that neighborhood. A lighting system had been provided and the playground was used in the evenings as well as in the day time.

Trains often stopped or moved very slowly through the area in question because of heavy train traffic, switching or stopboard signals. Trains sometimes moved at speeds as slow as a walk. The speed was limited to 15 or 20 miles an hour.

For many years youngsters ranging in age from about six to sixteen years of age frequently went up a pathway on the east side of the sloping embankment at the north side of Van Buren Street. From there the children went southwards upon the elevation and crossed over Congress (now the Eisenhower) Expressway to the playground, or went north by the same route from the playground to Van Buren Street or Jackson Boulevard. This occurred daily. The youngsters played on the tracks and often climbed on the standing trains, or got on slowly moving

trains, rode a short distance, jumped off, and had a good time.

This use of the elevation between Jackson Boulevard and Congress Street as a means of passage to and from the playground became more extensive after Congress Expressway was built and fenced on both sides because the only way youngsters could go to the playground from the north side of Van Buren Street near Rockwell Street was either by using the direct route along the elevated embankment as a passageway, or by going an extra half mile via the bridges or crossings at Western or California Avenues.

The daily use of the elevated embankment and the tracks by the children, and their climbing on standing cars and riding on the side of the slow moving cars, had been going on for at least 25 years prior to the occurrence. This use of the elevation by the children was more extensive after school hours in warmer weather and throughout the day during vacations.

Salvatore Sparachio testified that he owned and operated a screw machine plant on the south side of Harrison Street, a short distance west of the tracks. He was born in that neighborhood and grew up there. After he moved to a home elsewhere, he continued to operate his business at Harrison and Rockwell Streets. He described the physical conditions in the area. He was 35 years old, and from the time he had been about twelve years old, children had gone on the railroad elevation and tracks between Harrison and Van Buren Streets. He had been up on the tracks himself when he was a youngster, lots of times, had walked on and crossed over the tracks many times, and during the years had seen other boys do the same thing, down until June, 1959. The children were up on the elevation and tracks daily during the summer time. The children played on the tracks, got on trains as they were

passing through and jumped off, having a good time. Mr. Sparachio stated that at no time prior to June 12, 1959, was there a fence erected on the east side of the railroad tracks along the north side of Van Buren Street. He had called up the North Western Railroad police to tell them about children on the tracks, and children jumping on and off trains.

Hugo R. Koehler, of Skokie, Illinois, retired, testified that he was a conductor for the Baltimore and Ohio Railroad for about 35 years. On trips for the Baltimore and Ohio over this stretch of tracks at Van Buren and Rockwell, he usually rode in the caboose on the northbound trip from 14th and Robey [Damen] to the St. Paul at Grand Avenue and Western between 1:00 and 1:30 in the afternoon. They would arrive there about 2:00, and would leave there about 2:30 or 3:00 in the afternoon, southbound to 14th and Robey [Damen]. These trips were on the No. 1 or most easterly track going north, and the No. 2, second from the east (Pennsylvania track), going south. He made these trips daily between the years 1956 and 1960. On the trip northbound he very seldom saw "kids" up there on the right of way, but coming back in the afternoon around 3:30 or 4:00 P.M., they would see quite a number of children up there trying to get on trains. When the "kids" were getting on or off the trains, the speed would be pretty slow, around four or five miles an hour. These children would be on the right of way, and looking at you, and throwing stones, and sometimes there would be little tots asking for chalk. Neither he nor his men ever gave them any chalk but they sometimes did use chalk as part of their job in the railroad yards. The children would get on the side of a car or the caboose, would get on and off, and get on and get off again. They (the railroad men) would be very careful when they saw the children, would tell them to keep off the cars, and would be very careful when they told

them to get off because they (the children) get scared and might jump off before getting to the bridge (the girders) and that is where they could get caught. Ordinarily, the youngsters would get off when they were told to, and naturally some youngsters wouldn't, would start to try to kid, but usually, if they (the railroad men) were close to them, the children would get off the cars.

The children rode on all kinds of foreign trains, the New York Central, the Soo Line, various railroads. This was true both on the Pennsylvania and the NorthWestern trains. Koehler saw children getting on and off trains in that area for several years. If he saw children there, he would tell them to get off the right of way and not to flip the trains, and would try to explain how dangerous it was to get on the train because of the girders. If the children were on another train or in the middle of Koehler's train, that would scare the railroad men because they couldn't holler at the children or warn them. He reported to his own company, to the Baltimore and Ohio, that there were children on the tracks, and had no doubt that he mentioned it to the yardmaster of the Chicago, Milwuakee and St. Paul Railroad at Western Avenue, told them that there were a lot of kids there. He testified at an inquest in August, 1957, at the County Morgue that he had frequently seen children playing up on the tracks in that area.

Henry Lee Edwards, the plaintiff, was born January 2, 1946, and in June, 1959, when injured, was approximately thirteen years and five months old. He was in the lower half of seventh grade, called 7-B, in Manley Elementary School. His health, eyesight and hearing were good, and he was not crippled or deformed in any way before the accident; he was of average intelligence. Before he was injured, he was a member of a regular boy scout troop, played baseball in a league and was a patrol boy.

The plaintiff had been up on the elevation at Rockwell previously, and he stated the conditions shown in the various photographs were that way as long as he had known them. He usually walked up the path on the east side of the embankment, just north of Van Buren to get to the playground. If this passage on the elevation wasn't used to get there, it required a trip of a half mile, using the crossing at Western or California Avenues. The boys going over to the playground or coming back home from it took the short cut on the railroad embankment. To Henry Edwards' knowledge, children used that elevated embankment every day before he was hurt. When up on the elevation, the children would wave at the railroad men and ask for chalk. Sometimes the railroad men would throw chalk out the window, aand sometimes they said they didn't have any. At times Edwards saw children on the railroad cars while the cars were moving or standing. Children used to hop on the trains, ride about a block, and jump off. At times the trains would stop and railroad men would get on or off. The kids would climb the ladders and jump off.

During the four years that Henry Edwards played on the elevation and used that path to go to the playground or to go back home, a man spoke to him on one occasion about not going up there. He thought that was about a year and a half before he was injured. The man, who had seen Edwards coming through the fence at the playground, told Henry and the boy with him that they shouldn't be up there. He said nothing further, and nothing about danger. Henry stayed off the elevation for two or three days, but the other boys were still going up there, and some of them were friends of his, and he started to up up there again. He had never gotten on any railroad cars while they were standing or moving before the day of the accident.

On June 12, 1959, when he was injured, Edwards and a friend, Lopez, were on their way to the playground to play ball. The accident happened on a school day and the plaintiff attended school in the morning. There were classes in the afternoon but he did not attend; it was a hot day and he went swimming at a public swimming pool with some boys he knew. Then he went home, then went to the house of a friend, Jose Lopez, and they were on their way to the playground to play baseball. Lopez was fourteen or fifteen years old, and he was taller and bigger than Henry Edwards. They attended the same school and were in the same grade. Edwards and Lopez went up the pathway at Van Buren and Rockwell, using the pathway leading from the public sidewalk up to the stone wall at the point where a large stone was missing, just north of Van Buren Street, on the east side of the railroad tracks. When they got up on the tracks, Lopez and Edwards started towards the park and then they saw a train approaching, going north, on Pennsylvania track 1. Lopez jumped onto a ladder of one of the cars. After he saw Lopez get on, Henry Edwards also got on, and they both rode the slow moving freight train about two blocks, to about Adams Street. There they jumped off and started playing around and then headed back towards the playground.

Just before he was injured, Henry Edwards got on a southbound Milwaukee Railroad freight train consisting of about ten or twelve cars. It was on Pennsylvania track 2, the second track from the east. The two boys were walking back to the playground, going south, when they heard this southbound train approaching. No bell was rung or whistle blown. The boys were just west of track 2, and when the engine got close, they stepped out of the way and stopped, facing towards the train. The train was going very slow. The window was open on the engineer's side, and he was there in the cab. They waved at him and he

waved back, but there was no conversation. Lopez got on the tank car which was right in front of the caboose, at the back end of the train, and Henry followed him. There was a place (boardwalk) on the tank car where one could stand and hold on and walk around. Both boys got on that car and rode down to the girders at Van Buren Street, holding onto a (horizontal) pipe. They were standing on the west side of the car and the caboose was right behind them. It was about 5:15 P.M.

The boys were standing on the boardwalk which extends around the tank car, and when they got to the girders at Van Buren Street, the top of the girder was about one-half foot higher than the boardwalk around the tank car, and there was about six inches space between the tank car and the girder. The girders are about a foot and one-half wide, on top. As the tank car was slowly passing alongside the girders at Van Buren Street, Lopez jumped onto the girder to the west of the train. The plaintiff followed him, somewhere about the middle of the girder, and got onto the girder all right. The girder was dry. Edwards was then going to jump down to the ground on the other or west side of the girder but never got to do that. He bumped into Lopez, lost his balance, and fell down on the east side of the girder between the girder and the train. The next thing he remembers was coming to in the Illinois Research Hospital. He had suffered the complete traumatic amputation of his left leg about 4 to 5 inches below the top of the hip bone. The leg was brought to the hospital in a bushel basket. He also suffered the loss of his right leg about three inches below the knee. It was attached only by skin, about an inch wide, when Henry arrived at the hospital, and the amputation was completed there.

Emil Hessert, a witness for defendants, employed as a police lieutenant by the Pennsylvania Railroad, testified

that his duties took him into the area of Rockwell and Van Buren Streets. He stated his job was to protect the property of the railroads and merchandise in the trains, but that he warns people off the property, in the majority of cases juveniles, and if the boys are "flipping trains" or stoning trains, he takes their names and addresses and takes them to their homes or the police station. He covered an area including various yards during each tour of duty, amounting to 30 to 37 miles, sometimes on foot and sometimes in his automobile. He couldn't drive alongside the railroad tracks in question from Jackson to Congress Street and therefore, when he got to Jackson, he drove west to California, a quarter-mile from the tracks, south to Congress Street, then east to a point near the tracks, where he parked and sat in his car for about one-half hour. He did not patrol the area in question from Jackson and Rockwell to Van Buren and Rockwell. He would then go to the 59th Street yard at 59th and Leavitt, a big classification yard, and check on shipments of cigarettes, liquor and especially valuable merchandise. In all, each day he covered several railroad yards, many miles of track, checked many trains, and checked on the work of his subordinates at certain yards. Sometimes he gets tied up on special calls, any one of which may be for a full day, as when the seal has been broken on a car with valuable merchandise, and where some of the merchandise is missing. These special assignments take priority. Hessert testified that during the periods he was there at Congress Street, he saw children on the right of way at Van Buren Street on several occasions, and also on the right of way opposite the playground, and has seen children moving south on the railroad right of way to get from Van Buren Street to the playground, or coming back from the playground going north. That had been true all during the period that he was there.

There were "No Trespassing" signs posted in the area but they did not remain standing. Sometimes they would be there for one day, sometimes for a week before they were no longer standing.

Gerald W. Hipskind, a witness for defendants, a policeman for the Chicago and NorthWestern Railroad Company, testified that he patrolled the elevation daily and that his duties took him into the area of Van Buren and Rockwell Streets; that he visited the elevation during the noon hour on June 12, 1959, and at 3:00 P.M., when children are released from school. He said he saw Henry Edwards and another boy on October 17, 1958, on the NorthWestern tracks in the vicinity of the Congress Street bridge, talked to them and explained the dangers, told them how easy it was for them to lose their arms or legs by jumping on or off trains, and warned them against playing on the tracks in the future, took their names and addresses and the names of their parents and the schools they attended, "released them," and then made a report. During the years he worked there, children of various ages, from six to sixteen years, would go up on the railroad tracks. He testified he was in the area of Rockwell Street several times a week, would park his car at Jackson, enter the elevation at Jackson Boulevard, walk south to Congress Street and back to Jackson. He said he would be there every day all during the school year, during the lunch period, and then from 3:00 to 5:00 P.M., walking back and forth on top of the railroad right of way, patrolling from Madison Street to the playground, even on poor days in the wintertime when it was snowing or sleeting or raining, all the year round. He testified that he found Edwards and another boy on the NorthWestern tracks in the vicinity of Congress Street, something that a lot of kids had done for 17 years as far as he knew. He did not remember what these two boys were doing on that day, or whether they tried to run toward

him or away from him, and could not remember the words he spoke to them except that he had a procedure he followed. He could not remember what he actually said to Henry Edwards on the day referred to in 1958. Edwards denied that Hipskind warned him about getting on trains. He had not been on any train.

Count II of the complaint is based upon the case of *Kahn* v. *James Burton Co.*, 5 Ill. 2d 614, and charges the Pennsylvania Railroads with the negligent violation of their common law duty to use reasonable care to protect children from injury by reason of activities and conditions hazardous and dangerous to youngsters who were likely to go upon the property of the defendants. The rule in the *Kahn* case was stated by the Court at p. 625: "* * * where the owner or person in possession knows, or should know, that young children habitually frequent the vicinity of a defective structure or dangerous agency existing on the land, which is likely to cause injury to them because they, by reason of their immaturity, are incapable of appreciating the risk involved, and where the expense or inconvenience of remedying the condition is slight compared to the risk to the children [, then] * * * there is a duty upon the owner or person in possession and control of the premises to exercise due care to remedy the condition or otherwise protect the children from injury resulting from it. (*Wagner* v. *Kepler*, 411 Ill. 368.) The element of attraction is significant only insofar as it indicates that the trespass should be anticipated, the true basis of liability being the foreseeability of harm to the child. Whether the lumber pile was sufficiently attractive to entice children into climbing upon it, whether its condition would involve danger from such activity, and whether the contractor should have anticipated the probability of the accident, were matters for determination by the jury. *City of Pekin* v. *McMahon*, 154 Ill. 141." Plaintiff contends that defendants-appellants

violated this duty by reason of their failure to fence the area between the northeast Van Buren Street underpass wall and the existing fence erected by the Chicago Housing Authority paralleling the elevation.

Defendants maintain that a moving railroad train does not fall within the category of "a defective structure or dangerous agency existing upon the land" as a matter of law and that therefore the *Kahn* case has no application to the case at bar; and that, rather than the *Kahn* case, the case of *Briney* v. *Illinois Central RR. Co.*, 401 Ill. 181, and *Jones* v. *Schmidt*, 349 Ill. App. 336, are controlling here.

The *Kahn* case involved a child who was playing on a pile of lumber at a building construction site; the pile toppled over and one of the heavy boards fell on the child's back fracturing his spine. Plaintiff there proceeded on the attractive nuisance theory, but the Court refused to accept this theory as the basis for liability, because, as it stated at p. 624: "The naming or labeling of a certain set of facts as being an 'attractive nuisance' case or a 'turntable' case has often led to undesirable conclusions. The inclination is then to find a *stare decisis* pigeonhole or category. The difficulty in such procedure is that too often the result of such a search is the reaching of irreconcilable conclusions." After noting the conflict which has resulted in the cases due to the attempt to categorize a particular set of facts, the Court concluded: "In view of the foregoing conflict and the fact that, as many courts have declared, a child in his youthful fancy, imagination and ingenuity can make a plaything of almost anything and is attracted by almost everything, the only proper basis for decision in such cases dealing with personal injuries to children are the customary rules of ordinary negligence cases."

The import of the *Kahn* case is clear. Were we to accept defendants' distinction between objects in motion and sta-

tionary objects, the net result would be to "pigeonhole a certain set of facts" and thereby defeat the purpose behind the *Kahn* rule. Again, the plaintiff proceeds under the *Kahn* rule and not, as defendants here contend, under the attractive nuisance doctrine. The *Kahn* case has adopted the theory of "foreseeability of harm to the children" as the true basis of liability. The element of attraction is important only insofar as it indicates that a trespass should have been anticipated by the owner or the possessor of the land and the question of whether the object involved was attractive so as to entice children upon it is a question for the jury. Under the facts of this case a jury could reasonably have found that the moving railroad train was sufficiently attractive to entice children into climbing upon it, that its condition would involve danger from such activity, and that the defendants should have anticipated the probability of the accident. We therefore are of the opinion that an injury to a child caused by a moving railroad train can come within the scope of the *Kahn* rule.

Defendants rely on the cases of *Briney* v. *Illinois Central RR. Co.*, 401 Ill. 181, and *Jones* v. *Schmidt*, 349 Ill. App. 336, as controlling here. The *Briney* case involved an eight year old child who was injured while attempting to hitch a ride on a moving train. The court held that, even though the child was on the defendant's property by consent, he exceeded the scope of his invitation by attempting to jump aboard the train and was therefore a trespasser. The case was decided seven years before the *Kahn* case and was not tried on the attractive nuisance theory which was then the law in Illinois but rather on the novel theory that the plaintiff was on the defendant's property to help the railroad men do their work. The court in the *Kahn* case noted the *Briney* decision, but then in effect stated that it did not apply where harm from an object on the land was foreseeable to children who were enticed upon the land by

the allurement of the object. The *Jones* case also involved the questions of invitation and trespass by exceeding the scope of the invitation and was not tried on the attractive nuisance theory. *Jones* was decided three years prior to the *Kahn* case. In neither *Jones* nor *Briney* was the question of foreseeable trespass raised as it was in the *Kahn* case and here. Secondly, the court in the *Kahn* case was not concerned with trespass as a bar to recovery in cases involving personal injuries to children where the trespass is foreseeable: "The element of attraction is significant only in so far as it indicates that the trespass should be anticipated, the true basis of liability being the foreseeability of harm to the child." *Kahn* v. *James Burton Co.*, 5 Ill. 2d 614, 625. The plaintiffs in the *Briney* and *Jones* cases, on the other hand, were denied recovery due to the element of trespass. The *Kahn* rule must therefore take precedence over the *Briney* and *Jones* cases where trespass by children and resulting harm are foreseeable.

Defendants further contend that the trial court erred in refusing to direct a verdict in their favor on the grounds that plaintiff's claim was barred as a matter of law for the reason that he had violated a statute which prohibits the unpermitted climbing onto a moving railroad train. (Ill. Rev. Stat. 1961, Chap. 114, § 72.) In support of this contention defendants rely on the case of *Griffin* v. *Chicago & W.I.R.R. Co.*, 101 Ill. App. 284. The *Griffin* case, decided in 1902, involved a nine year old boy who was injured while attempting to jump onto a moving railroad train. An Illinois statute prohibited such activity. The trial court directed the jury to find for the defendant railroad and the Appellate Court affirmed the judgment, thereby holding in effect that the plaintiff's claim was barred as a matter of law by reason of his violation of the statute.

The *Griffin* case does not state the law of Illinois as it presently exists. "Violation of the law by the injured

party at the time of the accident is usually evidence of negligence, but there remains a question of fact whether the illegal act is the proximate cause of the injury." *Bonnier* v. *Chicago, B. & Q. R. Co.*, 2 Ill. 2d 606. It is only one of the facts to be considered in determining whether a party is guilty of negligence or contributory negligence. *Reinert* v. *Willing*, 13 Ill. App. 2d 163. Secondly, the question of negligence on plaintiff's part is involved here. Where the party charged with the negligence is within the seven year to fourteen year age group, the presumption exists that he is incapable of negligence; this presumption can be rebutted, however, by the party's alleging the negligence showing that the child had the mental capacity to act negligently. *Hughes* v. *Medendorp*, 294 Ill. App. 424; *Levin* v. *Lauterbach Coal & Ice Co.*, 329 Ill. App. 180. All the plaintiff in such age group is required to do is show that at and just before the time of the accident he was in the exercise of that degree of care which a child of his age, experience, intelligence and mental capacity would be exercising under like or the same circumstances. *Hughes* v. *Medendorp*, 294 Ill. App. 424. Whether the presumption has been rebutted is a question of fact for the jury, as is the question of whether the violation of the statute constituted the proximate cause of the injury.

A correlated objection raised by the defendants to the trial court's rulings is that the court erred in refusing to direct a verdict for defendants on the grounds that plaintiff was contributorily negligent by jumping on and off the moving railroad train. This objection must fail for the same reasons set out above concerning the violation of the statute. Whether the presumption that plaintiff, a thirteen year old child at the time of the accident, was incapable of acting negligently was rebutted by defendants' evidence as to his mental capacity, experience, age and intelligence was a question of fact for the jury. The trial

court properly refused to direct a verdict for defendants on both the matter of contributory negligence and the matter of the violation of the statute.

Defendants further maintain that the trial court was in error in submitting plaintiff's Instruction Number 14 to the jury. The instruction reads as follows:

> "A child is not held to the same standard of conduct as an adult: When I use the words 'ordinary care' with respect to the plaintiff, I mean that degree of care which a reasonably careful child of the age, mental capacity and experience of the plaintiff would use under circumstances similar to those shown by the evidence. The law does not say how such a child should act under those circumstances. That is for you to decide.
>
> "The rule I have stated also applies when a child is charged with having violated a statute.
>
> "With respect to the charge that the plaintiff violated a statute by going upon a railroad car, you are advised that in the case of a child thirteen years old, it is presumed under the law that a child of that age does not have the mental capacity to violate the law, and the party relying upon the claimed violation of the statute by the child has the burden of overcoming that presumption by proving that the child did have such capacity at the time."

Defendants contend that paragraph three of the instruction imposed the burden on the defendants to show that the plaintiff had the mental capacity to violate the statute, whereas this may be the rule for criminal behavior but not for a civil violation; they rely upon *Griffin* v. *Chicago & W. I. R. R. Co.*, 101 Ill. App. 284, in support of this position.

Paragraph three of the instruction correctly states the law of Illinois as it presently exists. A child under fourteen years of age is presumed incapable of violating a penal statute. *Angelo* v. *People*, 96 Ill. 209; *People* v. *Lang*, 402 Ill. 170. This presumption is not conclusive, however, and

may be rebutted by a showing that the child did in fact have the mental capacity to violate the law. *People* v. *Lang*, 402 Ill. 170. Defendants set up the claimed violation of the statute as an affirmative defense, thereby taking upon themselves the burden of proving the violation in fact occurred. Without their showing that the plaintiff had the mental capacity to violate the statute, which is one of the elements in the affirmative defense, no violation in fact could have been proven against plaintiff. Defendant's assertion that the presumption of incapacity under fourteen years of age does not apply to "civil violations" can be answered simply by saying that the violation of a statute is merely presumptive evidence of negligence, *Smith* v. *Ohio Oil Co.*, 10 Ill. App. 2d 67, and that where negligence is involved the burden is still on the party alleging the negligence to rebutt the presumption that a child under fourteen is incapable of negligence. If the violation is equated to negligence, then it is still incumbent upon the party alleging the violation to rebutt the presumption that the child is incapable of negligence. The instruction properly stated the law.

Finally, three forms of verdict were submitted to the jury: (1) for plaintiff and against all the defendants; (2) for plaintiff and against only the Pennsylvania Railroads; and (3) against plaintiff and for all defendants. Defendants-appellants suggest that the trial court was in error in refusing to submit the following fourth form of verdict to the jury:

> "We, the jury, find against the defendant, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, and assess the plaintiff's damages in the sum of $.....
>
> "We, the jury, find in favor of the defendants, The Pennsylvania Railroad Company, a corporation, and The Philadelphia, Baltimore & Washington Railroad Company, a corporation, and against the plaintiff as to the said defendants."

It is true, as defendants point out, that this form of verdict does follow IPI 45.03 for use with a single plaintiff and multiple defendants. However, under the state of the law in Illinois relating to negligence by a lessee railroad, the submission of this form of verdict to the jury would clearly have been erroneous. It has long been settled in Illinois that the lessor railroad is vicariously liable to a person injured through the negligence of the lessee railroad, even though there had been no fault on the lessor railroad's part. *Chicago & E. I. R. Co.* v. *Schmitz*, 211 Ill. 446; *Armstrong* v. *C. & W. I. R. R. Co.*, 350 Ill. 426. If the jury found that the Milwaukee Railroad was liable for damages due to its negligence, then it was bound under the law to find that the Pennsylvania Railroads were also liable: under no circumstances could the jury have found the Milwaukee Railroad liable for damages and the Pennsylvania Railroads not liable. The three forms of verdict submitted to the jury therefore represented the only possible results to which the jury could come.

The ordinance relied upon by appellee under Count I of the complaint was the City of Chicago special contract ordinance of January 18, 1897, as accepted by the Pennsylvania Railroad through its various subsidiaries on February 5, 1897. The ordinance in substance required the accepting railroads to elevate certain portions of their track; to construct underpasses at various cross streets, and to either build retaining walls for the elevations or enclose them with fences in accordance with the City of Chicago fencing ordinance of 1890.

In two cases decided in 1925, the Supreme Court of Illinois held that the passage of the Public Utilities Acts of 1914 and 1921 rendered invalid all municipal enactments and ordinances, both general and special, which related to public utilities. *Village of Atwood* v. *C. I. & W. RR.*

Co., 316 Ill. 425; *Northern Trust Co.* v. *Chicago Rys. Co.*, 318 Ill. 402. In the *Northern Trust* case, the Court held that a City of Chicago general ordinance requiring headlights on streetcars was rendered invalid by passage of the Acts, and that a person who was fatally injured when struck by a streetcar due to an improperly functioning headlight was precluded from relying upon the ordinance for recovery. The Court stated at page 412: "If it had been deemed wise or necessary, municipal ordinances and police regulations relating to public utilities could have been continued in force until the commission acted, by a saving provision in the act or by an order to that effect from the commission itself. But the act contains no such provision, nor does it appear that the commission made, or was asked to make, any such order."

Shortly after the decisions in the above two cases, the Illinois Commerce Commission adopted General Order 121, which is entitled: "In the matter of practices and operations by public utilities relating to the health, comfort or safety of their employees and of the people in cities, villages and incorporated towns in the State of Illinois." This order states, in substance, that the decisions by the Supreme Court in the above two cases indicate that the passage of the Public Utilities Acts of 1914 and 1921 repealed by implication certain police powers conferred upon municipalities by the Cities and Villages Act, and that these police regulations were now inoperative and without authority of law; that these municipal enactments may be in the form of general ordinances or specific provisions in contracts or licenses, franchises, or other forms of regulatory provisions; that difficulty and delay would necessarily attend a comprehensive survey of all such enactments and that the public would be without protection during the period of investigation. The order further stated that it appeared some immediate and compre-

hensive action should be taken by the Commission continuing the police regulations in the form of city ordinances or regulations. The Commission ordered that all practices and operations of every public utility in compliance with any ordinance or regulation of any city, village or town providing for the protection of the health, comfort or safety of the employees of the utility or of the people of the state, be established, continued and maintained until further order of the Commission.

On July 29, 1937, after some two and one-half years of hearings and investigations, the Commission adopted General Order 138, which is entitled: "In the matter of Rules, Regulations and Requirements relating to the construction, maintenance, marking and protection of crossings of Highways and Railroads in the State of Illinois." The order is captioned: "In the matter of proposed revision and consolidation of rules and regulations and requirements of the Commission relating to the construction, maintenance, marking and protection of crossings of highways and railroads in the State of Illinois, as now set forth in General Orders 4, 33, 36, 40, 50, 55, 106, 119, 120 and 123." The order states in substance that the Commission adopted a resolution whereby proceedings were instituted for the revision and consolidation of its rules, regulations and requirements relating to the construction, maintenance, marking and protection of crossings of highways and railroads, that hearings were held and evidence was taken on various dates between January 16, 1935 and June 9, 1937, which evidence included a copy of the proposed General Order 138, and that the Commission, having considered all of the evidence, is of the opinion that the proposed General Order 138 sets forth reasonable, just and proper rules, regulations and requirements relating to the construction, maintenance, marking and protection of crossings of highways and railroads in the State of Illi-

nois, and that the adoption of the said General Order 138 will result in the Commission's requirements on this subject being assembled in a single document, and being brought up to date and in harmony with present conditions, and will promote the safety and convenience of the public and of the railroads in this State; that all of the General Orders enumerated in the caption of General Order 138, except General Order 4, should be rescinded; and that General Order 121, to the extent that it applies to railroads, should be superseded and rescinded by General Order 138, but otherwise to remain in effect. The Commission ordered that General Order 138 is adopted and declared to be the rules and regulations and requirements of the Commission relating to the construction, maintenance, marking and protection of crossings of highways and railroads in the State of Illinois, that General Orders 33, 36, 40, 50, 55, 106, 119, 120 and 123 are rescinded, and that General Order 121, to the extent that it applies to railroads, is superseded and rescinded by General Order 138, but otherwise to remain in effect.

Appellants take the position that General Order 138 completely nullified General Order 121 as it applied to railroads, which in turn removed any duty on their part to fence the area between the Van Buren Street underpass wall and the existing fence which ran parallel to the elevation; that appellee is therefore precluded from relying on the special ordinance in question as a ground for liability; and that the trial court was in error in allowing the ordinance into evidence and in allowing it to serve as the basis of an instruction to the jury. Appellee contends that, although the ordinance may have been rendered invalid by the passage of the Public Utilities Acts, the requirements of the ordinance were continued in force and effect by General Order 121; that General Order 138, while it may have rescinded the grade cross-

ing requirements reinstated by General Order 121, had no effect on the fencing requirements reinstated by that order; and that the statutory duty still remained with appellants to fence the area in question.

We are of the opinion that the fencing requirements of the City of Chicago special ordinance of January 18, 1897, were in force and effect at the time of appellee's injury; that appellants had the duty to fence the area in question; and that the trial court properly admitted the ordinance into evidence and allowed it to serve as the basis of an instruction to the jury.

Sec. 67 of the Public Utilities Act (Ill. Rev. Stat. 1963, Chap. 111⅔, § 71) which was in effect at the time of the adoption of General Order 138, requires that the Illinois Commerce Commission give notice of the subject matter to all interested parties and afford them an opportunity to be heard before it can alter or rescind any prior order. Furthermore, the Commission's authority to act under section 67 is controlled by section 65 of the Act (presently section 69) in that any such rescinding or modifying order must be based upon findings of fact which in turn must be based upon the evidence presented. *Farmers' Elevator Co. of Yorkville, et al.* v. *Chicago, R. I. & P. Ry. Co.*, 266 Ill. 567; *Central Northwest Business Men's Ass'n. et al.* v. *Commerce Commission, et al.*, 337 Ill. 149. The Commission is without power to change existing regulations arbitrarily or through caprice. If the statutory requirements are not followed as to notice or hearing or presentation of evidence and finding of fact based thereon, the Commission loses its jurisdiction to act and any order entered by the Commission under such circumstances is necessarily void. *Chicago District Pipeline Co.* v. *Commerce Commission*, 361 Ill. 296; *Dietman* v. *Hunter, et al.*, 5 Ill. 2d 486; 2 Am Jur. 2d Administrative Law §§ 398, 400.

Examination of General Order 138 shows that the notice of the hearings and the hearings themselves, upon which the order was based were limited to the, "general revision and consolidation of rules and regulations and requirements of the Commission relating to the construction, maintenance, marking and protection on crossings of highways and railroads in the State of Illinois, as now set forth in General Orders 4, 33, 36, 40, 50, 55, 106, 119, 120 and 123." No reference was made to General Order 121 at this point. It is also significant to note that all of the aforementioned orders, except General Order 121, dealt specifically with some phase of highway and railroad crossing marking, maintenance, protection and construction. The entire body of General Order 138, including the forms and drawings relating thereto, shows that the inquiry was precisely limited to the subject of marking, maintenance, construction and protection of crossings of railroads and highways, and indicates that evidence was taken on that subject alone. The findings are limited to the subject of marking, maintenance, protection and construction of crossings of highways and railroads and in no way indicate that the subject matter of fencing is involved. Finally, nowhere in the entire document is there a word pertaining to the subject matter of fencing.

Appellants suggest that the finding and order of the Commision, that "General Order 121, to the extent that it applies to railroads, should be deemed to be superseded and rescinded by General Order 138, but otherwise to remain in effect," were intended simply to remove any and all railroad ordinance requirements from the purview of General Order 121 to the jurisdiction of General Order 138. But the wording of the finding and the order in question is susceptible to two different interpretations, namely, that the Commission found and ordered that all railroad ordinance requirements covered by General Order 121, including

fencing, should be rescinded and superseded by General Order 138, or, that the Commission found and ordered that General Order 138 rescinded and superseded General Order 121 as it applied to railroads but only insofar as General Order 138 was capable of so doing. Where such ambiguity exists in an administrative order the rule of construction applicable to statutes and to judgments and decrees of court should be applied. See 50 Am. Jur. Statutes §§ 225, 226; 2 Am. Jur. 2d Administrative Law § 307; *Aloe* v. *Lowe, et al.*, 298 Ill. 404, 408.

The Commission knew the extent of the notice given, of the hearings and investigations, and of the findings of fact made for the purpose of effectuating General Order 138. Its stated purpose in adopting General Order 138 was to unify into a single document and to bring up to date its requirements on the subject of construction, maintenance, marking and protection of crossings of highways and railroads. Not one shred of evidence exists that the Commission was concerned with matters other than crossings of highways and railroads. Another of its stated purposes in the adoption of General Order 138 was the protection and convenience of the public and the railroads operating in the State of Illinois; the Commission's purpose in adopting General Order 121 was the reinstatement of the protection afforded by municipal enactments affected by the passage of the Public Utilities Acts during the period while the Commission was engaged in a comprehensive survey of all such enactments. Appellant's construction of that part of General Order 138 here in question, however, would frustrate the Commission's intention to afford protection to the public, by eliminating these protections in all phases of railroad activity other than the construction, maintenance, marking and protection of crossings. To attribute to the Commission the intention of rescinding any and all railroad ordinance requirements covered by

General Order 121 is therefore unreasonable. This is especially true in view of the fact that such a construction of the order would render the entire order void for lack of proper notice, hearings, and findings of fact as to all railroad ordinance requirements covered by General Order 121 other than those relating to the maintenance, marking, protection and construction of crossings. It is evident that the effect of General Order 138 upon General Order 121 was intended by the Commission to be limited solely to the scope of General Order 138, namely, the rescission of all railroad ordinance requirements covered by General Order 121 relating to marking, maintenance, construction and protection of crossings and in no way was intended to affect the fencing requirements.

The question of collateral attack on a Commerce Commission order raised by appellants is moot; under the construction given to General Order 138, a consideration of the validity of the order is unnecessary. Secondly, applying the rule applicable to judgments and decrees of court, the construction of an order does not involve an attack upon its validity. See 30A Am. Jur. Judgments § 69; *St. Louis, K. C. & C. RR. Co.* v. *Wabash RR. Co.* and *City of St. Louis*, 217 U. S. 247; *Ballew* v. *Denny*, 296 Ky. 368.

Similarly, the review provisions of the Public Utilities Act have no application here. This court is not attempting to put itself into the place of the Commerce Commission; it is not attempting to try a second time a question already presented to the Commission; nor is it attempting to substitute its own judgment for that of the Commission. Construction of ambiguous wording in an administrative order and a reconsideration of the merits of the order are two entirely different matters.

We find no conflict between the views presented here and those presented by the United States Court of Appeals

for the Seventh Circuit in the recent case of *Blaauw v. Grand Trunk Western Railroad Company*, 333 F. 2d 540. John Blaauw, a five year old boy, was injured by defendant's railroad train. He and two companions were on defendant's right of way, having gained access thereto by an unfenced culvert which was frequently used by the neighborhood children to get to a small pond of water on the right of way. Blaauw crawled between two railroad cars and after he got to the other side the train began to move. He took hold of a grab-bar on the car, ran with the train a short distance, tripped and fell under the wheels. Plaintiff maintained at trial that (1) defendant had violated its common law duty to fence the area and to take necessary precautions under the circumstances in accordance with the Kahn rule and (2) defendant had violated the duty to fence imposed by an 1890 Chicago ordinance as continued in force and effect by General Order 121 of the Illinois Commerce Commission; and that this was the proximate cause of his injury. The trial court directed a verdict for defendant on the ordinance count, relying on General Order 138 as the basis therefor, and the jury found for the defendant on the common law count. Plaintiff appealed, alleging (1) that the verdict was against the manifest weight of the evidence and (2) that the trial court erred in directing a verdict for the defendant on the ordinance count for the reason that General Order 138 was ineffective due to procedural errors on the Commission's part in adopting the order. The Court of Appeals affirmed, holding that the questions of negligence, proximate cause and damages were jury questions and that the reviewing court will not interfere unless it is clearly evident that the verdict is against the manifest weight of the evidence; that the jury could reasonably have found that the defendant's conduct was not the proximate cause of the injury; and that plaintiff had relied on the procedural errors

involved in the adoption of General Order 138, thereby challenging a voidable order only incapable of collateral attack. In the case at bar, however, appellants do not raise the question of sufficiency of evidence, but rely solely on other questions of law for reversal. Secondly, the plaintiff in this case requested a construction of General Order 138 as the preferred alternative to questioning its validity, which was not requested in the *Blaauw* case.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

FRIEND, *J.*, and BRYANT, *J.*, concur.

STATE OF ILLINOIS.

Illinois Commerce Commission.

In the matter of practices and operations by public utilities relating to the health, comfort or safety of their employees and of the people in cities, villages and incorporated towns in the State of Illinois.	General Order No. 121

By the Commission:

The Supreme Court of the State of Illinois, in case No. 15984, entitled the Village of Atwood, Appellant, *vs.* the Cincinnati, Indianapolis and Western Railroad Company, Appellee, in an opinion filed April 24, 1925, and reported in Illinois Reports, Volume 316 Page 425, followed by the decision of the Court in case No. 16142, entitled the *Northern Trust Company, Admr.*, v. *the Chicago Railways Company*, reported in Illinois Reports, Volume 318, Page 402, decided that the Legislature of the State of Illinois, by the passage of "An Act to provide for the regulation of Public Utilities," approved June 30, 1913, in force January 1, 1914, and by the successive act entitled "An Act concerning Public Utilities," approved June 29, 1921, in force July 1, 1921, repealed, by implication, certain police powers conferred upon municipalities by the Cities and Villages Act of the state of Illinois for the protection of the health, comfort or safety of the public and the regulation of the operation and practices of public utilities in relation thereto.

By the above decisions of the Supreme Court of the State of Illinois it would appear that certain police regulations heretofore enacted by the various municipalities of the State of Illinois have become inoperative and without authority of the law.

It appears also to the Commission that the various municipal enactments containing such provisions may be either in the form of general ordinances, in specific provisions in contract or license franchises, or in various other forms of regulatory provisions, and that difficulty and delay would necessarily attend a comprehensive survey of all such municipal enactments providing various forms of police regulation in the several cities and municipalities of this State concerning the operation and practices of utility corporations, and that the public would be without the protection of law during the period of investigation.

It appears further that some immediate and comprehensive action should be taken by this Commission continuing the police regulations heretofore having the authority of law by virtue of city ordinances or regulations, insofar as the validity of such municipal ordinances or regulations may be affected by the passage of "An Act to provide for the regulation of Public Utilities," approved June 30, 1913, in force January 1, 1914, and by its successive act entitled "An Act concerning Public Utilities," approved June 29, 1921, in force July 1, 1921.

The Commission being fully advised finds that the practices and operations established and maintained by each and every public utility in the State of Illinois as of October 28, 1925, in compliance with any ordinances or regulations of any city, village or incorporated town of the State of Illinois providing for the protection of the health, comfort or safety either of the employees of such public utility or of the people of the State of Illinois, insofar as the validity of such municipal ordinances or regulations may be affected by the passage of "An Act to provide for the regulation of Public Utilities," approved June 30, 1913, in force January 1, 1914, and by its successive act entitled "An Act concerning Public Utilities," approved June 29, 1921, in force July

1, 1921, should be established, continued and maintained as the practices and operations of such utility from and after the date of this order until the further order of this Commission.

IT IS THEREFORE ORDERED by the Commission that the practices and operations established and maintained by each and every public utility in the State of Illinois as of October 28, 1925, in compliance with any ordinances or regulations of any city, village or incorporated town of the State of Illinois providing for the protection of the health, comfort or safely either of the employees of such public utility or of the people of the State of Illinois, insofar as the validity of such municipal ordinances or regulations may be affected by the passage of "An Act to provide for the regulation of Public Utilities," approved June 30, 1913, in force January 1, 1914, and by its successive act entitled "An Act concerning Public Utilities," approved June 29, 1921, in force July 1, 1921, be, and the same are hereby ordered, established, continued and maintained as the practices and operations of such utility from and after the date of this order until the further order of this Commission.

By order of the Commission at Springfield, Illinois, this 21st day of April, 1926.

(Signed) JULIUS JOHNSON,
Secretary.

STATE OF ILLINOIS.

Illinois Commerce Commission.

Illinois Commerce Commission,
On its own motion.

In the matter of proposed general revision and consolidation of rules and regulations and requirements of the Commission relating to the construction, maintenance, marking and protection of crossings of highways and railroads in the State of Illinois, as now set forth in General Orders 3, 33, 36, 40, 50, 55, 106, 119, 120 and 123. } 23408

By the Commission:

On December 11, 1934, the Commission adopted a resolution whereby proceedings were instituted for the revision and consolidation of its rules, regulations and requirements relating to the construction, maintenance, marking and protection of crossings of highways and railroads, as set forth in the general orders enumerated in the title.

Notice of the proceedings as served on all railroads operating in the State of Illinois, as well as upon the railroad brotherhoods and other parties, as in the record set forth. Hearings were held on various dates between January 16, 1935, and June 9, 1937, and numerous informal conferences were also held. In all the record shows twenty-three dates of setting for hearing or conference. On June 9, 1937 the case was marked heard and taken, evidence having been introduced, all of the interested parties having been heard, and a copy of proposed General Order 138, being the aforesaid revision and consolidation of rules,

regulations and requirements, as drafted and revised at the numerous hearings and conferences, being in evidence.

The Commission having considered all of the evidence, and having before it the aforesaid draft of General Order 138, is of the opinion and finds that the said General Order 138, a copy of which is attached to this order, sets forth reasonable, just and proper rules, regulations and requirements relating to the construction, maintenance, marking and protection of crossings of highways and railroads in the State of Illinois, that the adoption of the said General Order 138 will result in the Commission's requirements on this subject being assembled in a single document, and being brought up to date and in harmony with present conditions, and will promote the safety and convenience of the public and of the railroads operating in this State, and that the said General Order 138 should now be adopted.

The Commission further finds that General Orders 33, 36, 40, 50, 55, 106, 119, 120 and 123, being the presently existing general orders on the same subject as General Order 138, should now be rescinded, but that General Order 4 should remain in effect.

The Commission further finds that General Order 121, to the extent that it applies to railroads, should be deemed to be superseded and rescinded by General Order 138, but otherwise to remain in effect.

It Is Therefore Ordered that General Order 138, a copy of which is attached hereto, be, and it is hereby, adopted and declared to be the rules, regulations and requirements of this Commission relating to the construction, maintenance, marking and protection of crossings of highways and railroads in the State of Illinois, effective September 1, 1937.

It Is Further Ordered that General Orders 33, 36, 40, 50, 55, 106, 119, 120 and 123 be, and they are each of them

hereby, rescinded, and that General Order 121, to the extent that it applies to railroads, is superseded and rescinded by General Order 138, but otherwise said General Order 121 shall remain in effect.

By order of the Commission at Chicago, Illinois, this 19th day of July, 1937.

(Signed) William W. Hart,
Secretary.

(Seal)

Office-Supreme Court, U.S.
FILED
JAN 4 1965
JOHN F. DAVIS, CLERK

No. 740

In the

Supreme Court of the United States

OCTOBER TERM, 1964.

JOHN BLAAUW, a minor, by Gerhard Blaauw, his father and next friend, and GERHARD BLAAUW,

Petitioners.

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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The Scheffer Press, Inc.—ANdover 3-6850

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MAY IT PLEASE THE COURT:

The petition for a writ of certiorari should be denied because it presents no questions worthy of review under the standards of Rule 19 of this Court.

The three alleged questions presented (Petn. 3) are purely questions of Illinois law that relate to a General Order of the Illinois Commerce Commission and its alleged effect on a claimed duty of respondent to fence its right of way in the City of Chicago under an ordinance passed in 1890. It would be difficult to imagine questions more peculiarly local in their nature. And even if they were resolved in favor of petitioner a reversal of the

judgment of the Court of Appeals would not be required. In support of the jury's verdict, and District Court judgment, respondent advanced other points but the Court found it unnecessary to consider them saying, "We have considered, but need not discuss, the other points raised" (Petn. 27).

This Court is asked to grant the writ because the decision of the Court of Appeals allegedly conflicts with a later decision of an Illinois Appellate Court in *American National Bank and Trust Company* v. *The Pennsylvania Railroad Company*. The Illinois Appellate Court, however, said:

> "We find no conflict between the views presented here and those presented by the United States Court of Appeals for the Seventh Circuit in the recent case of *Blaauw* v. *Grand Trunk Western Railroad Company*, 333 F. 2d 540" (Petn. 53).

Petitioner thus is in the anomalous position of invoking a subsequent decision as the basis of a conflict and at the same time contending the Court is wrong when it says that a conflict does not exist. Surely, the express statement of the Illinois Court that no conflict exists should settle the question.

STATEMENT.

Petitioner's Complaint against defendant was in two counts. Count I was based on common law negligence; Count II was under an 1890 ordinance of the City of Chicago, repealed in 1939 (Secs. 1-1, 1-16, Municipal Code of Chicago, 1939), but allegedly continued in force by General Order 121 of the Illinois Commerce Commission. Petitioner claimed that under the Ordinance and Order defendant had a duty to construct and main-

tain a fence at the place of the accident. The District Court directed a verdict for respondent as to Count II. Count I was submitted to the jury which returned a verdict in respondent's favor. On petitioner's appeal the Court of Appeals upheld the jury's verdict on Count I and held that the District Court did not err in directing a verdict as to Count II. As to this Count it held:

(1) The 1890 Chicago ordinance had been abrogated by the Public Utilities Act of Illinois, originally passed in 1913 and re-enacted in 1921;

(2) That General Order 121 of the Illinois Commerce Commission, entered in 1926, which continued the "operations and practices" of utilities under municipal police regulations had been rescinded by General Order 138, passed in 1937;

(3) That plaintiff could not collaterally attack the validity of General Order 138 on the grounds of certain alleged procedural errors.

Because of the ruling it made in regard to General Order 138 the Court of Appeals had no occasion to consider: (1) Whether defendant ever had any obligation to fence its right of way at the place of the accident under the 1890 ordinance; or (2) whether General Order 121 required respondent to fence its right of way because that order continued only operations and practices of public utilities which were in existence at the time of its entry and there was no evidence that respondent had ever established the practice of fencing its right of way at the place of the accident; and (3) assuming General Order 121 purported to require respondent to fence at the place of the accident, whether it was valid, as a matter of statutory or constitutional law, because it was entered without notice to the railroads, and without hearings of any kind.

REASONS FOR DENIAL OF THE WRIT.

I.

The Appellate Court of Illinois Has Expressly Stated That There Is No Conflict Between Its Decision In American National Bank and Trust Company v. The Pennsylvania Railroad Company And The Decision Of The Court of Appeals In This Case.

Rule 19 of this Court provides that certiorari will be granted "only when there are special and important reasons therefor." The rule states that among the character of reasons that will be considered is "Where a court of appeals • • • has decided an important state • • • question in a way in conflict with applicable state • • • law."

Hence, before this Court will review a decision of the Court of Appeals on a question of state law it must be shown: (1) The question is *important*; (2) The decision conflicts with applicable state law.

The questions presented by the petition meet neither test. Essentially, they relate to the interpretation and validity of two general orders of the Illinois Commerce Commission to the extent they may deal with the fencing of respondent's right of way at the place of the accident.

Under their diversity jurisdiction, Federal courts are frequently called upon to determine state law. In the quarter century since *Erie Railroad* v. *Tompkins*, 304 U.S. 64, the instances in which this Court has granted the writ to determine whether a Court of Appeals has misapplied state law are almost nonexistent. There is no question of state law presented by the petition that is so important as to impel the Court to depart from its customary procedure of permitting these questions to be finally determined by the Court of Appeals.

The primary reason asserted for granting the writ is that the decision of the Court of Appeals conflicts with the decision of the Illinois Appellate Court in *American National Bank and Trust Company* v. *The Pennsylvania Railroad Company*. In the *Pennsylvania Railroad* case a child was run over by a freight train which he had boarded, while attempting to alight therefrom. Plaintiff relied upon a *special contract* ordinance of Chicago, which required the railroad to fence at the place of the accident. The Illinois court recognized that the ordinance had been invalidated by the passage of the Illinois Public Utilities Act of 1914 and 1921, but held it had been continued in force by General Order 121 of the Illinois Commerce Commission passed April, 1926, which ordered "that the practice and operations established and maintained" by each public utility as of October 28, 1925, be continued "as the practices and operations of such utility" (Petn. 58). On July 19, 1937, the Commerce Commission ordered that General Order 121 "to the extent that it applies to railroads, is superseded and rescinded by General Order 138" (Petn. 61). In the Court of Appeals petitioner contended only that General Order 138 was invalid because of certain procedural errors but the Court held that the order was "not subject to collateral attack (Petn. 27). The Illinois Appellate Court held that the special contract ordinance (not involved as to respondent) was continued in force by General Order 121 and was not repealed by General Order 138. Its attention had been called to the decision of the Court of Appeals and it specifically said that there was no conflict between its views and the view of the Court of Appeals, as has been noted above (Petn. 53). This should settle the issue of supposed conflict. We doubt that this Court has ever been confronted with

a situation where an alleged conflicting decision has expressly stated there was no conflict. We submit, that the claim of conflict is completely devoid of merit.

II.

The Petition Should Be Denied Because Even If The Questions Allegedly Presented Were Decided In Favor Of Petitioner The Judgment Of The Court Of Appeals Would Have To Be Affirmed.

Only narrow questions of Illinois law are presented by the petition. But, even if they were resolved in favor of petitioner the judgment of the Court of Appeals would have to be affirmed. As already noted, respondent advanced a number of reasons why it had no duty to fence at the place of the accident. Because of the conclusion it reached, the Court of Appeals had no occasion to consider them (Petn. 27). Although we do not think that an answer to a petition for a writ of certiorari is a place to argue, at length, narrow and obscure questions of local law, we believe that some mention should be made of these other points to show the futility of granting further review of the three questions urged.

General Order 121 of the Illinois Commerce Commission ordered that the "practices and operations established and maintained" by each public utility in the State of Illinois as of October 25, 1925, in compliance with any ordinances "are hereby ordered established, continued and maintained as the practices and operations of such utility from and after the date of this order until the further order of this Commission" (Petn. 58). The location of petitioner's accident was at 77th Place and Central Park Avenue in the City of Chicago. At the time of the 1890 ordinance and until a few years before the accident, this was unbroken prairie (A. 93).

Accordingly, respondent never installed any right of way fences. Petitioner never introduced any evidence that respondent had any "practice" of fencing its right of way at the place of the accident at the time of the issuance of General Order 121. For this reason alone, the question of whether General Order 121 was rescinded by General Order 138 is academic because General Order 121 never required respondent to fence at the place of the accident.

Again, there is no evidence that respondent or its predecessors received a notice from the municipal authorities to fence at the place of the accident. Another independent ground for sustaining the Court of Appeals judgment is that, under the ordinance relied upon, an obligation to fence arose only after notice by the mayor or commissioner to fence at a particular place, and no proof of notice to fence at the place of the accident was given. See *Curran* v. *C. & W. I. R. R. Co.*, 289 Ill. 189. In this respect the instant case is different from the case of the *Pennsylvania Railroad Company*, relied upon by petitioner. There the plaintiff relied upon a special contract ordinance of January 18, 1897, which required the accepting railroads to either build retaining walls or fences in accordance with the general fencing ordinance of 1890.

Finally, General Order 121 shows on its face that it was issued because of the decisions of the Supreme Court of Illinois in *Village of Atwood* v. *C. I. & W. R. Co.*, 316 Ill. 425, and *Northern Trust Company* v. *Chicago Railway Co.*, 318 Ill. 412, both decided in 1925 (Petn. 56). It recites that by the above decisions it would appear that certain police regulations by various municipalities of Illinois have become inoperative; that an order should

be entered pending a survey of municipal police enactments regarding public utilities. The Commission, therefore, ordered that the practices and operations established and maintained as of October 28, 1925, be "ordered established, continued and maintained as the practices and operations of such utility from and after the date of this order until the further order of this Commission" (Petn. 56-58). General Order 121 shows on its face that it was issued without (a) notice to anyone, (b) hearings, or (c) the taking of evidence (Petn. 57). The Illinois Commerce Commission's sole authority for issuing general or special orders respecting safety practices of public utilities when the 1926 order was entered was found in Section 57 of the Public Utilities Act of 1921 (Smith-Hurd Ill. Rev. Stats. 1927, Ch. 111⅔ § 61), which required a hearing before the Commission could issue safety orders. General Order 121 is invalid as a matter of statutory law because no hearing was ever held as the Illinois statute required.

Moreover, General Order 121 is invalid as a matter of Federal Constitutional law. An administrative agency, in purporting to bind public utilities to continue their established safety acts and practices, acts in a quasi judicial capacity. Under the Illinois Public Utilities Act a corporation can be heavily fined and natural persons fined and imprisoned for violating orders. Ill. Rev. Stats. Ch. 111⅔ Par. 80, 81. This Court has settled that where an administrative agency acts in a quasi judicial capacity a hearing is essential to due process and if such a hearing is not given the agency order is void. *Londoner* v. *Denver*, 210 U.S. 373; *Morgan* v. *United States*, 304 U.S. 114; *Southern Railway Co.* v. *Virginia*, 290 U.S. 191.

In the *Pennsylvania Railroad* case, the Illinois Appellate Court assumed the validity of General Order 121, apparently because it was never questioned.

CONCLUSION.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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